No. 83-857

In the Supreme Court of the United States

OCTOBER TERM, 1983

TOWN OF ORANGETOWN, PETITIONER

v.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in awarding sewage treatment grants to the Rockland County Sewer District No. 1, the Environmental Protection Agency failed to make determinations required by agency regulations, 40 C.F.R. 35.925.

2. Whether, in light of the opposition of petitioner and others to the project underwritten by the federal sewage treatment grants, the agency erred in determining that preparation of a full-scale environmental impact statement was not required.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 718 F.2d 29. The district court's findings of fact and conclusions of law (Pet. App. A29-A47) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1983. The petition for a writ of certiorari was filed on November 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. By this action, filed in the United States District Court for the Southern District of New York, petitioner challenges the award of federal sewage treatment grants to the

Rockland County Sewer District No. 1 (RCSD) and the Town of Ramapo. The challenged grants are intended to underwrite the expansion and improvement of the area's sewage collection system and sewage treatment plant. These projects were initiated because RCSD's existing plant is too small to process the sewage generated within the District and urgently needs modernization, and because failing septic systems and inadequate sewer lines pose a serious threat to ground water supplies in Rockland County (Pet. App. A4-A5).

RCSD and the Town of Ramapo first applied to EPA for funding to begin planning sewage collection and treatment improvements in 1976. A grant for planning — the first stage of the three step grant sequence under the Clean Water Act construction grants program, 33 U.S.C. (& Supp. V) 1281 *et seq.* — was issued in that year. Over the next four years, RCSD prepared a voluminous "Facilities Plan" for the projected sewer improvements, consulting frequently with EPA and the New York Department of Environment Conservation, and modifying the proposal from time to time in light of those consultations, comments from interested members of the public, and the results of its own studies. Based upon the resulting Facilities Plan, in 1980 RCSD submitted a further application for a "Step 2" grant to fund design of the proposed improvements. The state agency certified its approval of the application to EPA, and on August 29, 1980, the EPA released a finding that the project would not have a significant environmental impact such as would necessitate preparation of a formal environmental impact statement (EIS) under the National Environmental Policy Act, 42 U.S.C. 4332(2)(C). That finding was based upon a 34 page environmental assessment that canvassed the justification for the project, assessed its environmental consequences, and listed measures taken to

mitigate any adverse impacts.[1] Design grants were awarded to RCSD and Ramapo in late 1980.

Before construction could commence or a step 3 grant in aid of construction could be sought, on February 26, 1981, petitioner filed this action to enjoin disbursement of the design grants, alleging, inter alia, that EPA had violated NEPA by preparing only an environmental assessment rather than a full-scale EIS, and had violated requirements applicable to Clean Water Act grants by failure to make three (of the 21) determinations listed by EPA regulations as preconditions for issuing an award of grant assistance. The regulations allegedly violated were: 40 C.F.R. 35.925-7 (treatment works design standards), 35.925-8 (NEPA compliance), and 35.925-13 (sewage collection system standards). After an 11-day trial the district court ruled against petitioner on all claims.

Following the trial, but before the district court had rendered its opinion, petitioner moved to amend its complaint to allege, for the first time, failure by EPA to make 17 other determinations required by 40 C.F.R. 35.925, the agency's construction grant regulations. Petitioner asserted that the amendment would simply conform the pleadings to the proof at trial. Respondents opposed the motion on the ground that they had neither expressly nor implicitly agreed to try the 17 additional claims and might have presented other evidence had such claims been properly before the court. The district court denied the motion to amend on January 25, 1983.

2. The court of appeals affirmed, upholding the EPA's "finding of no significant impact" and rejecting petitioner's claim that the agency had not made necessary determinations prior to awarding the grant. The court of appeals

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[1]The environmental assessment is reproduced in an appendix to the Brief in Opposition filed by RCSD and the Town of Ramapo at pages A5-A54.

considered petitioner's claims that a full-scale EIS was required because of project impacts on wetlands flood plains and land use, allegedly flawed sewage treatment plant design and public controversy (Pet. App. A14-A23). The court found that EPA did not abuse its discretion or act arbitrarily in concluding that the project would not significantly affect the environment in any of the respects claimed. In rejecting petitioner's claim that an EIS was required by virtue of the public controversy surrounding the project, the court of appeals noted that expansion of an unpopular sewage treatment plant can be expected to generate opposition. But the court observed that mere opposition unaccompanied by a genuine controversy as to the actual effects of the project on the environment does not indicate that preparation of a full-scale EIS is required. Pet. App. A22.

Upholding the district court's denial of petitioner's motion to amend its complaint to charge 17 additional violations of EPA's construction grant regulations (Pet. App. A24 n. 10), the court of appeals sustained the agency's action as to the three regulatory violations that had been timely alleged. Although the court suggested that it would have been preferable from the standpoint of a reviewing court for the agency to present the determinations required by 40 C.F.R. 35.925 in concise seriatim fashion, the court concluded, based on its review of the complete administrative record, that the agency had unmistakably made the required determinations (Pet. App. A24-A25).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. No further review is warranted.

1. a. Petitioner contends (Pet. 24-48), first, that EPA failed to make determinations required by 40 C.F.R. 35.925. The short answer is that both the district court and

the court of appeals independently reviewed the administrative record and expressly found that, to the extent placed in issue by petitioner, the necessary determinations had been made (Pet. App. A24-A25, A36-A37, A44).[2] Those rulings are plainly correct, as is revealed by examination of the environmental assessment prepared by EPA.

The determinations required by 40 C.F.R. 35.925-7 concern cost-effectiveness of the proposed treatment works, adequacy of capacity and reserve capacity, use of the best practicable waste treatment technology (BPWTT)[3] and prevention of excessive infiltration/inflow. These matters are covered in the environmental assessment (see RCSD

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[2]In its argument petitioner seems to ignore the rulings below that exclude 17 of the 20 allegedly missing administrative determinations from the scope of this case. Moreover, while it announces its disagreement with those rulings (Pet. 23-24) petitioner does not challenge them in this Court. In any event, the district court plainly did not abuse its discretion by denying a post-trial motion to enlarge drastically the scope of the complaint.

Petitioner complains (Pet. 17-21, 24, 28-29) about the post-argument submissions made by the government to the court of appeals in response to that court's request that the government identify those portions of the administrative record that embody the 17 determinations that petitioner belatedly charged the agency with omitting. Because the court of appeals ultimately upheld the district court's ruling excluding these issues from this case, and did not rely upon the government's supplemental submission in any respect, petitioner's apparent suggestion that it was deprived of some procedural right by the panel's requests for the additional submissions warrants no consideration. We note, moreover, that petitioner was served with a copy of the government's submissions and responded thereto (see Pet. 18, 20-21). Petitioner accordingly cannot claim any prejudice flowing from the court of appeals' clerk's alleged failure to notify their counsel of the requests made of the government.

[3]EPA has defined BPWTT to be secondary treatment that is cost effective. 40 C.F.R. Pt. 35 App. A; 40 C.F.R. Pt. 133. See *Environmental Defense Fund, Inc.* v. *Costle*, 439 F. Supp. 980, 1002 n.27 (E.D.N.Y. 1977).

Br. in Opp. App. A8-A9, A12, A14-A16, A19-A20, A28-A29, A30-A31, A39-A40). 40 C.F.R. 35.925-8 merely requires that the provisions of NEPA be satisfied. The very existence of the environmental assessment, coupled with the agency's accompanying finding that a full-scale EIS was not required by NEPA, reflects that the agency made the required determination. Finally, the environmental assessment demonstrates that the determinations regarding sewage collection systems required by 40 C.F.R. 35.925-13 were made (see RCSD Br. in Opp. App. A8-A9, A30-A31).

Petitioner does not undertake to find fault with the fact-bound ruling of the courts below that the allegedly omitted determinations were made. Because the administrative record in this case was more than sufficient to enable the reviewing courts below to ascertain that the agency had discharged its duty to make required determinations, there simply is no reason to consider here "the question of the effect of the failure of an agency to render findings required by statute or by its own regulation as the basis of non-adjudicative agency action" (Pet. 31). A fortiori, petitioner's discussion (Pet. 31-34) of the remedies triggered by such agency failures under statutory regimes that petitioner plainly recognizes to be distinguishable is wholly misdirected.

Equally misplaced is petitioner's reliance (Pet. 34-48) on *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), and *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). As the former case makes clear (401 U.S. at 417), formal findings, such as are prescribed by the Administrative Procedure Act for on-the-record rulemaking and adjudication, are not required in the case of less formal agency actions or decisions, such as those involved here. Moreover, because petitioner claimed only that the determinations required by 40 C.F.R. 35.925 had not been made — a factual question best resolved by reference to the administrative record

—and petitioner did not claim that any determinations were arbitrary or capricious, there is no occasion to consider whether discovery should have been made available to supplement the administrative record, or whether the reviewing court was enabled properly to assess the rationality of those determinations.

b. Petitioner seeks (Pet. 48-54) review of the court of appeals' statement that determinations pursuant to 40 C.F.R. 35.925 may be made in some form other than in writing. No question as to oral or implicit findings is presented in the instant case, however. As the court of appeals indicated (Pet. App. A24-A25), EPA's determinations in this case are reflected in the written administrative record; they were therefore made in writing.

Thus, the court of appeals correctly observed that the issue in the case is reduced to one of judicial convenience, and held in that regard that the regulations "do not require that the agency's actions be set down in any particular order or form, or even that its determinations be made in writing" (Pet. App. A24). See *Camp* v. *Pitts*, 411 U.S 138, 140-141 (1973); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. at 417. Petitioner cites no authority that suggests that any particular level of administrative formality was necessary in the setting of this case.

2. Petitioner seeks (Pet. 54-59) further review of the court of appeals' ruling that preparation of a full-scale EIS was not required simply because of the opposition of petitioner and others to the underlying project. Petitioner suggests that the court of appeals' ruling discloses an important unresolved issue as to whether "extraordinary" opposition—as opposed to some more ordinary level of opposition—is required to trigger preparation of an EIS. In its search for an issue to present to this Court, petitioner ignores the plain thrust of the district court's ruling.

The court of appeals noted that public opposition cannot in and of itself satisfy the statutory trigger for preparation of an EIS (a "major Federal action[] significantly affecting the quality of the human environment" (42 U.S.C. 4332(2)(C)); otherwise an EIS would invariably be held necessary whenever some party is willing to go to the trouble of suing a federal agency to require its preparation (Pet. App. A22). The court explained, moreover, that Council on Environmental Quality regulations (40 C.F.R. 1508.27(b)(4)) that suggest that the controversial character of a project is pertinent in determining the need for an EIS are directed at situations where there is controversy as to the actual environmental effects of the project under study (Pet. App. A22). Applying the latter criterion, the court of appeals simply observed that the agency's finding that no significant environmental impact such as would warrant preparation of an EIS was portended here was fully supported by the record and was not rendered "controversial" in the relevant sense by opposition to the project (*ibid.*).[4] Because petitioner does not quarrel with the foregoing analysis, and indeed seems to concede (Pet. 57-59) that a different approach would make an EIS necessary whenever a plaintiff is ready to go to court to insist on preparation of one, no matter what the objective dimensions of the environmental effects to be engendered, the question presented by petitioner does not warrant review by this Court.

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[4]Plainly, public opposition to a project is not in itself an environmental impact of the project. See *Metropolitan Edison Co.* v. *PANE*, No. 81-2399 (Apr. 19, 1983), slip op. 8-9, 11. Thus, to the extent the court of appeals' concluding statement that "[t]he record lacks a sufficient basis to indicate that the opposition to this project was of such an extraordinary nature as to require an EIS" (Pet. App. A22) is read as something other than an impressionistic summary of the reasoning described in the text, it is, if anything, unduly favorable to petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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